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No.

In the Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC., D/B/A LUSSIER SUBARU
SULLIVAN COUNTY MOTORS, INC., D/B/A SUBARU OF CLAREMONT;
CAMILLERI BROTHERS, INC., D/B/A C&C SUBARU;
KINNEY MOTORS, LTD; REYNOLDS' GARAGE & MARINE, INC.,
PETITIONERS

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH;
JOSEPH A. APPELBE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the First Circuit affirmed the decision of the United States District Court for the District of New Hampshire that the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, did not prohibit an automobile manufacturer from installing after-market accessories on automobiles, the cost of which could not be passed on to consumers, and then refusing to sell the automobiles to its franchised dealers without these after-market accessories. The Question Presented is:

1. Is "coercion" by a motor vehicle manufacturer, prohibited under the Automobile Dealer Day in Court Act, 15 U.S.C. 1221 *et seq.* ("ADDCA"), limited to violation of a motor vehicle dealer's contractual rights?

PARTIES TO THE PROCEEDING

Bald Hill Realty, Inc. d/b/a Bald Hill Subaru was a party to the proceedings before the First Circuit Court of Appeals, but is not a party to, and has no interest in, this proceeding. The caption of this Petition contains the names of all other parties to the proceeding in the First Circuit Court of Appeals whose judgment is sought to be reviewed. Petitioners submit the following Corporate Disclosure Statement pursuant to Supreme Court Rules 14.1(b) and 29.6:

1. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of George Lussier Enterprises, Inc. d/b/a Lussier Subaru.
2. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Sullivan County Motors, Inc. d/b/a Subaru of Claremont.
3. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Camilleri Brothers, Inc. d/b/a C & C Subaru.

4. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Kinney Motors, Ltd.

5. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Reynolds' Garage & Marine, Inc.

6. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Bald Hill Realty, Inc.d/b/a Bald Hill Subaru.

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The December 16, 2004 Opinion of the Court of Appeals is reported at *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 2004 U.S. App. LEXIS 26277 (1st Cir. 2004). The Order denying the Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* is unreported. The September 26, 2003 Opinion of the United States District Court for the District of New Hampshire is reported at *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 286 F.Supp.2d 86, 2003 U.S. Dist. LEXIS 17152 (D. N.H. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 16, 2004. A timely Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* was denied on January 21, 2005. The jurisdiction of this Court to review the judgment of the First Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The relevant provisions of the Automobile Dealer Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221 and 1222, are reproduced at Appendix, *infra,* 71-73.

STATEMENT OF THE CASE

Procedural Background

This action was filed in the United States District Court for the District of New Hampshire on March 5, 1999. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §1331, to the extent that petitioners' claims arose from 15 U.S.C. §1221 and other federal statutes, and supplemental

jurisdiction over petitioners' state law claims, pursuant to 28 U.S.C. §1367. The District Court certified a liability-only class of current and former New England Subaru dealers on August 3, 2001.

The parties filed cross motions for summary judgment, and the District Court entered summary judgment in favor of all respondents on October 31, 2003. Petitioners timely appealed the final order, pursuant to 28 U.S.C. § 1291, on November 26, 2003. A panel of the First Circuit Court of Appeals affirmed the decision of the District Court, holding that the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, did not prohibit an automobile manufacturer from installing after-market accessories on automobiles, the cost of which could not be passed on to consumers, and then refusing to sell the automobiles to the dealers without these after-market accessories. The Court of Appeals denied petitioners' Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* on January 21, 2005.

Statement of Facts

Subaru of New England, Inc. ("SNE") is the distributor for Subaru automobiles in the six New England states. Petitioners represent a certified class of current and former New England Subaru dealers ("the dealers") who were or are franchisees of SNE, and who challenge SNE's business practices. During most of the class period of 1995 to August, 2001, SNE sold automobiles to the dealers through an allocation formula called Fair Share II, which authorized SNE to hold back, as "discretionary," 11.5% of the cars sold to dealers. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 41 (1st Cir. 2004); Appendix at 23. The other 88.5 % were distributed through an allocation process, which took into account the rate of sales. Essentially, the more cars a dealer sold, the more it received in future allocations. *Id.* Of this 88.5%, cars not sold to the first dealer to whom they were allocated were called "turndown cars." Fair Share II did not specify how turndown cars would be sold, 393 F.3d at 41, 48;

Appendix at 23, and did not give SNE the right to accessorize turndown or discretionary cars. 393 F.3d at 48-49; Appendix at 35. The dealers proved that Subaru of New England pre-accessorized discretionary, turndown, and initial allocation cars[1] with overstocked aftermarket accessories such as leather shift knobs, hood deflectors, altimeters and the like, before selling them to the dealers. If a consumer actually wanted any of these accessories, a dealer could purchase them from SNE or another vendor, and install them at the consumer's request. Joint Appendix before the Court of Appeals ("CA App.") at 2486-2487, 2504, 2516.

Accessories were very profitable for SNE. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 286 F.Supp.2d 86, 91 (D. N.H. 2003), Appendix at 48. Its profit margin on accessories was 30% to 38%, CA App. 2029, 2080, 2579 – 2581, while its profit on cars was only 3%. Through most of the class period, SNE denied that it preaccessorized any cars. 393 F.3d at 42; 286 F.Supp.2d at 92; Appendix at 24, 49-50. In 1999, SNE finally admitted that it "pre-accessorized our demonstrators ... and any discretionary vehicles determined in accordance with current allocation procedures." CA App. 2615. SNE never admitted that it pre-accessorized turndowns in the same manner as discretionary cars. CA App. 2616-2619.

After a lengthy discovery dispute, which resulted in the imposition on SNE of a $40,000 sanction, SNE produced data that confirmed what the dealers had surmised – that SNE preaccessorized over 31.5%, not less than 10% as it had originally contended (CA App. 2638, 2643), of the cars sold during the class period, with approximately $24,000,000 in accessories. The dealers established that discretionary and

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[1] Initial allocation cars were the first month's allocation of every model year. 393 F.3d at 41; Appendix at 23. Although dealers were undisputedly "entitled" to allocation of these cars through the regular allocation system, they were so heavily pre-accessorized that, although they comprised only 1.5% of the cars SNE sold to dealers during the class period, they carried nearly 5% of the accessories sold during that same period. *See* chart below.

turndown cars were simply loaded with whatever was leftover in the warehouse and could not otherwise be sold. CA App. at 2060-2061, 2015; *see* 393 F.3d at 41, 45; Appendix at 24, 29.

From the data, the dealers were able to determine the total dealer cost of accessories installed for each category (discretionary, turndown, regular, initial allocation), and an average accessory cost to dealer per car for each category. 393 F.3d at 43; 286 F.Supp.2d at 91; Appendix at 27, 48. The results are as follows:

Category	# of Cars	Total Accessories	Access. Per Car	% of Total Cars	% of Total Access.
Regular Allocation	85,248	$28,830,830	$338	68.2%	54%
Discretionary Cars	14,359	$10,652,378	$742	11.5%	20%
Initial and Special Models	1,837	$2,499,119	$1,360	1.5%	4.7%
Turndowns	23,159	$11,339,908	$490	18.5%	21.2%
Postal Cars[2]	373	$54,077	$145	0.3%	0.1%
TOTAL	124,976	$53,376,312	$427	100%	100%

SNE did not dispute these calculations at summary judgment (CA App. 2973), and they were accepted by both the District Court and the Court of Appeals. 286 F.Supp.2d at 91; 393 F.3d at 43; Appendix at 27, 48. The dealers produced

[2] These were right-hand drive cars sold to U.S. Postal carriers.

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undisputed evidence that the accessories were undesirable, made the cars harder to sell and their cost could not be passed on to consumers. 393 F.3d at 44, 45; Appendix at 27. In addition, the dealers established through testimony of former SNE employees, corroborated by a regression analysis, that they were forced to purchase accessories on their regular allocation cars in order to obtain access to the turndown or discretionary cars. 286 F.Supp.2d at 92; 393 F.3d at 41-42; Appendix at 27, 48-49.

The dealers had no real choice but to purchase the 31.5% of the cars sold to the dealer class with unsalable accessories pre-installed. Subaru dealers were required to sell nothing but Subaru automobiles in their dealerships. There was a finite pool of Subaru cars available for distribution to New England Subaru dealers. Dealers competed for allocations from this pool by attempting to sell as many cars as possible, as rapidly as possible. A dealer who refused to purchase pre-accessorized cars would obviously lose the profit it would have otherwise have earned from the sale of those refused cars. However, the dealer also lost future allocations of cars, and the profits of the sales of those cars, because it had fewer cars to sell in order to compete for allocations under SNE's so-called "turn and earn" formula.

Moreover, under SNE's Franchise Agreement, dealers were required to "achieve...a level of [new car] registrations on an annual basis in the Area of Responsibility reasonably comparable...to that attained on the average by all other dealers...in their respective areas of responsibility." CA App. 1003. SNE took the position that dealers not meeting this standard were "under-performers" who were deserving of "aggressive action," including termination. Obviously, in order to achieve sales performance that is reasonably comparable to the average sales performance of other dealers, a dealer must have a supply of cars reasonably comparable to that of other dealers. In sum, the dealers had no real choice but to purchase the 31.5% of cars that SNE denominated as "turndown" or "discretionary," with the unsalable accessories pre-installed. If

they did not do so, they would be caught in a downward allocation spiral which would jeopardize their ability to achieve their required sales performance. This case thus presents the stark question of whether an automobile manufacturer may condition the dealer's purchase of essential inventory on purchasing accessories that are of no value to the dealer.

REASONS FOR GRANTING THE WRIT

This case provides the Court with the opportunity to restore a reasonable, easily applied test to determine whether conduct of automobile manufacturers toward their dealers is "coercive" in violation of the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.* ("ADDCA"). The ADDCA regulates, and prevents abuses in, the American automobile franchise system. Its vitality and importance to this microcosm of American commerce is demonstrated by Congress's continuing attention; it was amended as recently as November, 2002 to ameliorate one-sided arbitration provisions in automobile franchise contracts. *See* 15 U.S.C. §1226.

SNE, the New England distributor of Subaru automobiles, embarked on an "option-packing" scheme, whereby it made nearly one-third of the cars it sold to the dealer class available only with expensive and unwanted pre-installed accessories, the cost of which could not be passed on to consumers. Apparently believing that its practice violated state and federal laws, SNE denied its practices to the dealers for years.

Nearly forty years ago, the First Circuit Court of Appeals announced a practical, bright-line test to determine whether manufacturer conduct constituted "coercion" in violation of the ADDCA. If compliance with the manufacturer's demands on the dealer would benefit both parties, the demand was reasonable incentive; if compliance benefitted primarily the manufacturer, to the detriment of the dealer, then the demand was coercive. *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir.), cert denied, 385 U.S. 919 (1966).

The *Rohlsen* test has been widely adopted and quoted by other Courts of Appeals and District Courts.

However, the very Court of Appeals that had first announced this "one-sided benefit" test abruptly abandoned it in the proceedings below, pronouncing it "mere *dicta*." *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 45, Appendix at 30. At the same time, it provided no clear alternative for discerning coerciveness under the ADDCA. The Court of Appeals upheld SNE's option-packing practice because the dealers were not "contractually entitled" to the third of the cars offered only with pre-installed accessories. The opinion of the Court of Appeals means that the ADDCA provides dealers no more protection than does the franchise contract itself – a conclusion plainly at odds with the decisions of two other Circuit Courts of Appeal, numerous District Courts, and with the legislative history of the ADDCA itself.

I.
The Critical Economic Interests at Issue.

In 2003, the sale of automobiles in the United States was an $800 billion dollar industry. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States: 2004-2005*, No. 1020 (124th Ed.). Virtually all new automobiles in the United States are sold through a franchise system—a system designed by automobile manufacturers in the early part of the 20th century to allow them effectively to distribute, sell and service their products without incurring the enormous capital costs of establishing a national distribution network.

There were 21,650 franchised new automobile dealers in the United States in 2003. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States: 2004-2005*, No. 1027 (124th Ed.). The relationship between each one of these dealers and its manufacturer-franchisor is governed by the provisions of the ADDCA. Further, thirty-seven of the fifty states have enacted cognate statutes that provide automobile dealers with explicit protection from the

worst abuses of manufacturers. Various District Courts and Courts of Appeal have specifically held that the standard for determining coercion under the ADDCA and a particular cognate statute is the same. *See, e.g., Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876 (5th Cir. 1989); *Gage v. General Motors Corp.*, 796 F.2d 345, 350-51 (10th Cir. 1986); *Subaru Distributor Corp. v. Subaru of America*, 47 F.Supp.2d 415, 465, n.9 (S.D.N.Y. 1999); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F.Supp.2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997). Here, the First Circuit broadly stated that "courts have consistently held that 'coercion' under state dealer statutes holds the same meaning as under the ADDCA," and specifically so held with regard to the statutes of the six New England states. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 47, Appendix at 32. *See also Bishay v. American Isuzu Motors, Inc.*, Nos. 04-1392 and 04-1393, 2005 U.S. App. LEXIS 5616 (1st Cir. Apr. 7, 2005) at *10-11 (citing its opinion in *Lussier* as support for relying on ADDCA case law to interpret Massachusetts statute's definition of "motor vehicle dealer").

If the test for "coercion" is the same under both the ADDCA and the state statutes (a conclusion that Petitioners challenged below but do not raise here), then the decision below has profound and far-reaching consequences. A clear understanding of just what protection from coercion is offered by the ADDCA and the laws of 37 states is essential to the ability of those engaged in this bellwether industry to understand their rights and obligations. Clarity of the law is essential to guide, and hopefully prevent, manufacturer-dealer litigation in not only the federal District Courts and Courts of Appeal, but in the state courts.

II.
This Case Presents the Important Judicial Question of the Meaning of "Coercion" Under the Automobile Dealer Day in Court Act.

The concept of "coercion," although not immediately visible on the surface of the ADDCA, is at its heart. 15 U.S.C. §1222, the provision granting a cause of action under the ADDCA, allows a automobile dealer to sue its manufacturer-franchisor for "the failure of said automobile manufacturer...to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer...." Appendix, *infra* at 73. 15 U.S.C. §1221 defines "good faith" as follows:

> the duty of each party to any franchise...to act in a fair and equitable manner toward each other so as to guarantee the one party *freedom from coercion*, intimidation, *or threats of coercion* or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Appendix, *infra* at 71 (emphasis added). The genesis of the ADDCA and state motor vehicle franchise laws has been the manufacturers' abuse of their superior economic power to take unfair advantage of their dealers, including with regard to unwanted vehicles parts and accessories. The motor vehicle franchise system allows manufacturers to avoid the large capital investment in sales outlets and service facilities necessary to satisfy consumer demand, by shifting these investment costs to their dealers. Note, *State Motor Vehicle Franchise Legislation: A Survey And Due Process Challenge To Board Composition.* 33 Vand. L.Rev. 385, 387 (1980). Stewart Macaulay, *Law And The Balance Of Power: The Automobile Manufacturers And Their Dealers*, at 6 (1966). This investment makes the dealer dependent on the manufacturer and subject to its dictates,

whether or not they are fair and reasonable. Macaulay at 11-12, *see also* H. Brown, *A Bill of Rights for Auto Dealers,* 12 B.C. Ind. and Comm. L. Rev. 757, 760 (1971). In his dissenting opinion in *Ford Motor Company v. United States,* 335 U.S. 303, 323 (1948) Justice Black noted that "dealers are thus economic dependents of the company whose cars they sell."

The Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, was enacted in 1956 to level the playing field between automobile dealers and their franchisers. It is designed to reach "border-line antitrust violations," *Buono Sales Inc. v. Chrysler Motor Corp.* 449 F.2d 715, 724 (3d Cir. 1971), arising out of the manufacturer's control over its product in what amounts to a quasi-integration to the retail level of distribution. *Northview Motors, Inc. v. Chrysler Motors Corp.* 227 F.3d 78, 92-93 (3d Cir. 2000).

The legislative history of the ADDCA, which was not addressed either by the District Court or the Court of Appeals, demonstrates that Congress was particularly concerned about the very practice at issue here: a manufacturer's insistence that its dealers accept unwanted accessories.

> Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, *or sell a specified quota of, parts, accessories*, and tools made or approved by the manufacturer.

H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1956, 1956 U.S.C.C.A.N. 4596, 4603 (emphasis added.) Following enactment of the Act, the Courts of Appeal had no difficulty in recognizing that it prohibited the practices revived here by SNE:

> [O]ne of the principal evils which the Act was designed to remove was the exertion of pressures by the dominant automobile manufacturers upon dealers to accept automobiles, *parts, accessories*, and supplies

> which they neither needed nor wanted and which they felt their market would not absorb.

Woodard v. General Motors Corp., 298 F.2d 121, 128 (5th Cir. 1962) (emphasis added), (*citing* S.Rep. No. 2073, 84th Cong., 2d Sess. 2). *See also David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 56 and n. 7 (4th Cir. 1974) (manufacturer pressure to accept accessories can constitute coercion).

Good faith, or rather the manufacturer's lack of it, is the gravamen of an ADDCA claim. Under the ADDCA, "[L]ack of good faith ... must be found in the context of actual or threatened coercion or intimidation." *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1056 (1st Cir. 1985) (citations omitted). Coercion under the ADDCA is defined as the manufacturer's wrongful demand accompanied by threat of sanctions. Id.

Just how coercion is to be defined is the critical aspect of this case. Ironically, the seminal ADDCA case, which formed the generally accepted rule of what constituted coercion under the Act, was decided in the same First Circuit Court of Appeals that later rejected it. *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437 (1st Cir.) *cert denied*, 385 U.S. 919 (1966). *Rohlsen* discerned that, where compliance with a manufacturer's demand would benefit the dealer as well as the manufacturer, the demand is incentive, not coercive. However, where the demand benefits solely or primarily the manufacturer, it crosses the line into coercion. The Court noted:

> Particularly suspect under the act are conditions which benefit only, or primarily, the manufacturer -- for example, requirements that a dealer purchase large stocks of vehicles, *spare parts, special tools* or advertising matter -- as distinguished from requirements that would tend to work to the mutual advantage of both parties, for example, that the dealer improve its service, or managerial efficiency. The

> manufacturer can easily extort demands of the first sort, increasing its own profit at the expense of the dealer's; the act's legislative history indicates that this was of particular concern to the Congress.

Rohlsen, 360 F.2d at 442 (emphasis added), *quoted in part in Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985).

Rohlsen's succinct and sensible standard -- mutual benefit reflects permissible incentive, while one-sided benefit to the manufacturer reflects coercion -- made it a bellwether of ADDCA jurisprudence. *Rohlsen* has been cited in no fewer than 83 cases, and its one-sided benefit language has been quoted and adopted by a number of other Circuit and District opinions, including the Eleventh and Second Circuits, *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) (quoted); and *Autowest, Inc. v. Peugot, Inc.*, 434 F.2d 556, 561-562 (2nd Cir. 1970) (paraphrased and applied; and numerous District Courts: *General Motors Corp. v. Villa Marin Chevrolet, Inc.*, No. 98-cv-5206, 2000 U.S. Dist. Lexis 2772 (E.D.N.Y. March 7, 2000) at *57-58 (quoted); *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F.Supp. 2d 737, 745 (D. Md. 1996) (quote within quote); *K&H Kawasaki v. Yamaha Motor Corp.*, No. 95-cv-1824, 1997 U.S. Dist. LEXIS 5171 (N.D.N.Y April 14, 1997) at *14 (quoted); *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F. Supp. 1121, 1134 (D.R.I. 1982) (quoted); *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519, 532 (S.D.N.Y. 1972) (quote within quote); *Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, No. 98-cv-6141, 2000 U.S. Dist. Lexis 22130 (S.D.N.Y. Sept. 1, 2000) at *22 (quoted in part); *Martin Motor Sales, Inc. v. Saab–Scania of America, Inc.*, 452 F. Supp. 1047, 1051 (S.D.N.Y. 1978) (quoted in part); *Chinetti-Garthwaite Imports, Inc. v. Ferrari Societa per Azioni Fabbriche Automobili e Corse,* 463 F. Supp. 73, 79 (E.D. Pa. 1978) (paraphrased); *see also State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 414 (10th Cir. 1984) (distributors generally); *and Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792

N.E.2d 488, 497 (Ill. App. 2003) (quoted, discussing Illinois cognate statute).

III.
The Court of Appeals Erred in Abandoning its Own Sensible and Widely Accepted Standard.

The Court of Appeals, however, concluded that the *Rohlsen* one-sided benefit analysis, quoted substantively or paraphrased in 10 other cases, was "mere dicta." *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 45; Appendix at 30. The Court of Appeals continued, "we have now clarified that good faith under the ADDCA requires a showing of (1) wrongful conduct coupled with (2) sanctions," and concluded that in order to succeed on an ADDCA claim, a dealer must demonstrate that the manufacturer's sanctions encroach on something, such as allocation of vehicles, that dealers are *legally entitled* by their contracts to receive. 393 F.3d at 46; Appendix at 28.

The ADDCA's legislative history demonstrates that the demand to accept unwanted accessories, or accessory quotas, is "one of the principal evils which the Act was designed to remove ...." *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir. 1962); *see also* H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1956. Indeed, one of the demands identified in *Rohlsen* as "directly benefiting the manufacturer, but not necessarily the dealer" was a requirement that the dealer "stock spare parts equal in cost to ten percent of the value of its automobile stock." *Rohlsen,* 360 F.2d at 442. SNE's inventory dumping is essentially a requirement that the dealers purchase large stocks of spare parts – with the cars attached.

The Court of Appeals purported to rely on *Cabriolet Porsche Audi, Inc. v. America Honda Motor Co.*, 773 F.2d 1193, 1209-11 (11th Cir. 1985), in which a distributor's offer of extra cars beyond the regular allocation process in return for the dealer establishing an exclusive facility - an infrequent offer that would not affect the dealer's day-to-day ability to compete

with other dealers- did not amount to coercion violative of the ADDCA. The Court of Appeals ignored a critical difference in this case: over 30% of the SNE's cars were sold to the dealer only if the dealer agreed to pay for the unsalable and worthless accessories that were pre-installed on the cars. The Court of Appeals quoted an excerpt from *Cabriolet* in support of its view:

> [W]e have little doubt that had [the distributor] threatened to deny [the dealer] all cars, or any cars to which it was entitled, unless [the dealer] provided an exclusive facility, this would be evidence of coercion." [*Cabriolet*] at 1210...The distributor did not make a wrongful demand because it "did not threaten to take away, and did not take away, cars to which [the dealer] was entitled under the allocation system." *Id.*

Lussier, 393 F.3d at 44; Appendix at 27. But the Court of Appeals stopped short of this sentence in the very next paragraph of *Cabriolet*: "American Honda's suggestion did not present a 'condition[] [i.e. the exclusive facility] which benefited only, or primarily, the manufacturer,' as is typically the case in cases of 'coercion'...Both sides would be expected to profit if Cabriolet had gone exclusive." *Cabriolet* at 1210 (*quoting Volkswagen Interamericana, S. A. v. Rohlsen*) (citation omitted). *Cabriolet's* principles are those of *Rohlsen*, and even if the one-sided benefit test was mere *dicta* in *Rohlsen*, it became the holding of *Cabriolet*.

Here, dealers had no real choice but to purchase unwanted accessories to obtain access to the 31.5% of the cars SNE labeled as discretionary, turndown, and initial allocation, because their contracts required them to achieve in their area of responsibility sales performance that was reasonably comparable to the average sales performance of other dealers in their respective areas of responsibility. CA App. 1003. Dealers who did not meet this standard risked termination. Dealers could not simply forgo access to 31.5% of SNE's vehicles because under Fair Share II, allocation of automobiles

was based on the number of cars sold. 393 F.3d at 41; 286 F.Supp.2d at 90; Appendix at 22, 46.

The Court of Appeals also relied on *Colonial Dodge, Inc. v. Chrysler Corporation,* 11 F. Supp.2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997) which held that a manufacturer could require dealers to accept slower-selling automobiles as a precondition to receiving more popular models, without engaging in prohibited coercion under the ADDCA. The Court of Appeals neglected to note, however, that *Colonial*'s conclusion quoted *Cabriolet's* quote of *Rohlsen's* one-sided benefit analysis. *Colonial* recognized that the dealers benefited by receiving even slower selling cars from Chrysler, since Chrysler vehicles could be obtained nowhere else: "[*Cabriolet*] noted that 'Honda's suggestion did not present a "condition[] which benefited only, or primarily, the manufacturer," as is typically the case in cases of "coercion."'" *Colonial Dodge* at 737 (*quoting Cabriolet* at 1210, *quoting in turn Volkswagen Interamericana v. Rohlsen,* 360 F.2d at 442).

The difference between the one sided demand in this case and mutually beneficial conditions in *Cabriolet* and *Colonial* are demonstrated in the following chart:

	Requirement to Obtain More Cars	Benefit to Manufacturer	Benefit to Dealer	Harm to Dealer
Cabriolet	Expand Facility	Larger sales outlet to sell more cars	Larger sales outlet to sell more cars	None
Colonial	Purchase Slower-Selling Vehicles	Profit on sale of slower-moving vehicles	(1) Profit on slower-selling (but still profitable) vehicles which could be obtained only from Chrysler. (2) Profit from trade-in and warranty work.	None
Lussier	$1360 of accessories on initial allocation and special cars; $742 of accessories on discretionary; $493 of accessories on turndown; and $338 of accessories on "regular" cars to get access to discretionaries and turndowns	Profit of 30% to SNE on otherwise unsalable and undesirable accessories, compared to 3% profit on cars.	*No benefit to dealer. Accessories installed by SNE could be installed by dealer at customer request.*	*Accessories make the car harder to sell because consumers don't want them, and dealers cannot pass on all costs.*

CONCLUSION

The First Circuit Court of Appeal's rejection of its own "one-sided benefit analysis" that has been adopted by numerous Circuit and District Courts, and its decision that a dealer must demonstrate interference with a legally protected property right in order to state a claim under the ADDCA, is plainly incorrect. It is a radical change in settled law. It leads logically to the conclusion that the ADDCA provides no remedy not otherwise available for breach of contract. The analysis of what constitutes coercion, accepted by the Second and Eleventh Circuits and numerous lower courts – whether the benefit is entirely one sided – has stood the test of time. It is hardly extraordinarily favorable to dealers; it leaves ample room for business judgment. Congress has not seen fit to alter the *Rohlsen* test, which has been applied repeatedly by the federal courts, for 39 years.

Over thirty-seven states have enacted automobile dealer statutes which provide some counterbalance to the superior bargaining power of manufacturers by prohibiting specific practices. Virtually all of these statutes prohibit these practices to the extent that they constitute "coercion." The Court of Appeals noted that the standard of coercion under the state automobile franchise acts is generally considered to be the same as that under the ADDCA, and specifically so held with regard to the six New England statutes.

This Court's authoritative ruling on the definition of coercion will have a profound effect on the industry. The industry needs clear rules on what is prohibited and what is allowed. The First Circuit's decision is anomalous, unwise, and inconsistent with the clear legislative intent of Congress. The Court should restore certainty to the law by granting the Writ and reversing the decision of the First Circuit.

For the foregoing reasons, this Writ should be granted.

Respectfully submitted,

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